No. 86-1027

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In the Supreme Court
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United States

OCTOBER TERM 1986

SUN-LAND NURSERIES, INC., a California Corporation,
Petitioner,
vs.
SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS; AFFILIATED LABORERS LOCAL UNION 300; AFFILIATED LABORERS LOCAL UNION 652; and AFFILIATED LABORERS LOCAL UNION 1082,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

PETITIONER'S WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE STANDARD FOR ESTABLISHING ANTITRUST LIABILITY DEVELOPED BY THE NINTH CIRCUIT IS DIRECTLY CONTRARY TO THE RULINGS OF THIS COURT AND IN CONFLICT WITH THE RULINGS OF OTHER CIRCUIT COURTS OF APPEAL

Respondents contend, and the decision by the Ninth Circuit *en banc* (contained within Appendix "A" of the Petition) holds, that a lawful subcontracting clause "standing alone" cannot serve as the basis for antitrust liability. Respondents argue this is a correct application of the law and that there is uniformity of decision on this point. However, Respondents ignore the decisions of this Court, as well as case law developed outside the Ninth Circuit.

The Ninth Circuit limits liability under the Sherman Act [15 U.S.C. § 1, *et seq.*] solely to the set of facts arising in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). That is a conspiracy between a labor and a nonlabor group outside the four corners of a collective bargaining agreement must be established. However, Respondents overlook the alternative approach which does not require evidence of predatory intent of the type which existed in *Pennington*. This standard was developed in *Local Union No. 180, Amalgamated Meat Cutters v. Jewel Tea Company*, 381 U.S. 676 (1965) and *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). Under this latter test, a market restraint contained in a collective bargaining agreement must have as its objective a legitimate labor relations goal and the restraint must be no broader than necessary to obtain this goal. And, if the market restraint is aimed at

parties outside the collective bargaining relationship, it is subject to much closer scrutiny. This approach is a balancing test wherein the purposes of federal antitrust law are weighed against the right of organized labor to obtain improved wages, hours, and working conditions for its members. *See, also, Ackerman-Chillingsworth v. Pacific Electrical Contractors Association,* 579 F.2d 484, 492 (9th Cir. 1978), (concurring/dissenting opinion J. Hufstedler), *cert. denied,* 439 U.S. 1089 (1979).

If Respondents are correct, *i.e.,* a lawful collective bargaining agreement is automatically exempt, without additional facts, this Court's analysis in *Jewel Tea* would have stopped with a determination that the marketing hours restriction in dispute was lawful under the National Labor Relations Act. [29 U.S.C. § 151, *et seq.*] (hereinafter referred to as the "NLRA".) Instead, the Court engaged in an exhaustive analysis of the market restraints and labor relations objectives to finally determine the legitimacy of the agreement. *Jewel Tea* is crucial not because of its ultimate result but because of the method of analysis used, a method totally ignored by the Ninth Circuit in this case. Instead, the *en banc* panel ruled that absent circumstances such as existed in *Pennington, supra,* or unless the clause in question was illegal for purposes of labor relations law, no violation of antitrust law could ever be established based on the contract alone. Such a ruling is clearly contrary to the case law of this Court.

Respondents further suggest that every federal court of appeals which has considered this issue, has followed the rule of the Ninth Circuit. In support of their contention, Respondents cite *A. L. Adams Construction Co. v. Georgia Power Co.,* 733 F.2d 853, 858 (11th Cir. 1985), *reh'g denied,* 751 F.2d 394 (1985), *cert. denied,* 471 U.S.

1075 (1985); *Jou Jou Designs v. International Ladies Garment Workers Union*, 643 F.2d 905, 910 (2nd Cir. 1981); and *Suburban Tile Center v. Rockford Building Trades Council*, 354 F.2d 1, 3 (7th Cir. 1965), *cert. denied*, 384 U.S. 960 (1966). However, three other circuits have in fact ruled to the contrary.

In *Consolidated Express Inc. v. New York Shipping Association, et al.*, 602 F.2d 494, 512-522 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980), *on remand*, 641 F.2d 90 (3d Cir. 1981), the Court discusses this point in detail. And, while *Consolidated Express* also involved violations of the NLRA affecting the collective bargaining agreement, the antitrust issues are examined independently. It is clear from reading the opinion that it is the view of the Third Circuit that a collective bargaining agreement standing alone could serve as the basis for an antitrust violation, regardless of its validity under labor relations law.

In *International Association of Heat and Frost Insulators and Asbestos Workers, etc. v. United Contractors Association, Inc. of Pittsburgh, Pennsylvania*, 483 F.2d 384 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974), the primary focus of the antitrust claim was restricted to collective bargaining agreement. It was found to constitute the basis for an antitrust cause of action, after the alleged labor law violations were dismissed.

In *National Electrical Contractors Association, Inc. v. National Constructors Association*, 678 F.2d 492 (4th Cir. 1981), *reh'g denied*, 689 F.2d 1199 (4th Cir. 1982), *cert. denied*, 463 U.S. 1234 (1983), the collective bargaining was expressly found to have been lawful for labor relations law purposes. Yet, the contract itself was the sole basis for antitrust liability.

In *Great Atlantic & Pacific Tea Co., Inc. v. Amalgamated Meat Cutters & Butcher Workmen of North America, Local Union No. 88,* 410 F.2d 650 (8th Cir. 1969), the plaintiff stated *alternative* claims for antitrust law violations, as well as for secondary boycott damages in violation of the NLRA Section 303 [29 U.S.C. § 187]. Both claims were directed exclusively at a collective bargaining contract. Yet, the complaint withstood a motion to dismiss on the alternative grounds, *i.e.,* even if the secondary boycott allegations were without merit, presumably a cause of action for antitrust law based upon the union contract was stated.

Review by this Court is urgently necessary to clarify this issue. Under the standard advanced by the Respondents, a lawful collective bargaining contract would always be exempt from antitrust scrutiny, absent the facts in *Pennington, supra,* no matter how pervasive the market restraint contained within the agreement. Consequently, the National Labor Relations Board, who would judge the legality of the contract from a labor law standpoint, effectively becomes an enforcement agency for antitrust law an identical position taken by Justice Goldberg in *Pennington* was rejected by the majority of this Court. Employers and unions would have virtually unchecked power to limit competition, as long as no labor law violation was established and an "outside" conspiracy of the type in *Pennington* could not be proven.

Also, the argument of Respondents that an agreement standing alone is otherwise exempt leads to absurd results. That is, Respondents would subject a portion of a collective bargaining agreement to antitrust liability if a *Pennington* type conspiracy was shown, and the agreement was found to advance the conspiracy as did the wage clause in the *Pennington* case. Yet, Respondents would

automatically exempt an agreement that is overbroad, restrains trade in a manner far beyond what is necessary for labor relations purposes, unless a labor law violation or outside conspiracy is established. Such a distinction is clearly contrary to the cases as developed by this Court.

The instant petition must be granted by this Court to avoid the confusion created by the *en banc* decision. The ruling is contrary to the law of other circuits, and will permit wholesale restraints on trade and other similar market restrictions.

RESPONDENTS MISSTATE THE PROCEDURAL ISSUE RAISED BY PETITIONER.

It is Respondents' contention that the procedural issue raised by the instant petition is not worthy of review or further action by the Court. However, Respondents overlook numerous pertinent facts dealing with this question. As is obvious from the decision of the *en banc* panel, the stipulation entered into by the parties was strictly for purposes of summary judgment. In fact, it is interesting to note that the Respondents' entire defense was based upon the so-called "automatic exemption," *i.e.*, if a collective bargaining agreement was valid under the labor relations law it is automatically free from antitrust scrutiny. There is no question that this defense was rejected. Yet, had the case been remanded, which would have been the proper procedure, it is highly doubtful Respondents would have agreed that they were precluded from presenting additional facts once their sole defense, and the only issue they briefed, had been removed.

Also, if the stipulation and its effect were as broad as now claimed by Respondents, it is interesting that Respondents never raised this argument themselves. Instead it was developed entirely by the majority of the *en banc*

panel. Once again, this clearly indicates the intent of the parties was to limit the stipulation as stated.

Finally, as noted above, the Ninth Circuit refused to apply the alternative "least restrictive means test" as argued by the Petitioner. If all the facts in the case were stipulated to, and neither side could present further evidence, then the majority of the *en banc* panel at the very least they should have applied the alternative test to the stipulated facts once they decided that the automatic exemption argument was invalid.

CONCLUSION

For the above-stated reasons, Certiorari should be granted. Or in the alternative, the *en banc* panel decision issued by the Ninth Circuit should be vacated and the matter remanded back to the District Court to apply the "least restrictive means" test as was ordered by the three-judge panel of the Court (see Appendix "C" of the instant petition).

Respectfully submitted,

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January 22, 1987.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 22, 1987, I served the within Petitioner's Reply Memorandum in re: "Sun-Land Nurseries, Inc. vs Southern California District Council of Laborers" in the United States Supreme Court, October Term 1986, No. 86-1027;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Julius Reich and Alexander B. Cvitan
Reich, Adell & Crost
501 Shatto Place, Suite 100
Los Angeles, California 90021

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 22, 1987, at Los Angeles, California

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